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In The

Supreme Court of the United States

THE GOOD NEWS CLUB, *et al.*,

Petitioners,

v.

MILFORD CENTRAL SCHOOL,

Respondent.

On Writ Of Certiorari
To The United States Court Appeals
For The Second Circuit

BRIEF OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. The interest of the *amicus curiae*[1] is as follows.

The New York State School Boards Association ("NYSSBA") is a not-for-profit membership corporation incorporated under the laws of the State of New York located in Albany, New York. NYSSBA's membership consists of approximately 697 or 94 percent of the public school districts in New York State, including the Respondent herein. NYSSBA has often appeared as an *amicus curiae* in federal and state court cases affecting educational policy, with a particular interest in those involving separation of church and state issues. Notably, the *amicus curiae* has filed briefs before this Court in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) and *Mitchell v. Helms*, 121 S.Ct. 2530 (2000). The Association's General Counsel, Jay Worona, has presented oral argument before this Court in his capacity of Counsel of Record for the Respondents in *Board of Educ. of the Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994).

SUMMARY OF THE ARGUMENT

This Court has long held that where government property is not a traditional or designated public forum,

[1] This brief was written entirely by counsel for the *amicus* and not in any part by counsel for either party. No person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief.

government may restrict public access thereto "based on subject matter . . . so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (*Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 806 (1985), *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 392-93 (1993)). There is no dispute that the Milford Central School ("Milford" or "the District") has established a limited public forum regarding community use of its school facilities. (*Good News Club v. Milford Central School*, 203 F.3d 502, 509 (2nd Cir. 2000); Petitioners' Brief at p. 16). Instead, the present case concerns the constitutional validity of Milford's determination to deny the Good News Club and others associated with it (collectively "the Club"), an application for the use of school premises to conduct activities that include the teaching of Bible verses to young elementary school children, the memorization of passages from Scripture by those children, and their participation in prayer at the start and close of the Club's meetings. (Lodging at W1; Joint Appendix at F3-F5; Petitioners' Brief at pp. 7-9). More specifically, this Court is asked to determine whether the exclusion of such activities constitutes viewpoint discrimination under equal access rights guaranteed by the Free Speech Clause of the First Amendment to the United States Constitution.

Despite the Club's assertions to the contrary, Milford's refusal to grant the Club access to the use of its school facilities was not an act of viewpoint discrimination. The Club's activities at issue herein do not fall within the perimeters of Milford's limited public forum.

Neither do they constitute a viewpoint on matters otherwise within that forum. In addition, it is particularly reasonable to exclude from a limited public forum established by a public school district proselytizing activities of the type at issue herein that are conducted by a private group with very young impressionable public school students ages 6-12 as the intended target audience. Milford's actions were not motivated by hostility toward religion.

As acknowledged by this Court, there is a "myriad [of] subtle ways in which the Establishment Clause can be eroded," (*Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. 2266, 2281 (2000) and *County of Allegheny v. ACLU*, 492 U.S. 573, 591 (1989) both citing *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring), and "the law reaches past formalism" (*Lee v. Weisman*, 505 U.S. 577, 595 (1992)). Accordingly, Milford's decision to deny the Club access to its facilities for the purpose of conducting the activities at issue herein was properly justified by Establishment Clause concerns regarding the impression upon the minds of young elementary school children, as young as age six, that a public school is also a place of worship and religious evangelization.

Finally, contrary to the arguments advanced by the Club and its *amici*, there is no excessive entanglement caused by a school district's actions in determining whether a particular set of activities constitutes a religious viewpoint or evangelizing speech. Followed to its logical extension, the Club's argument would of necessity require that government confer upon religion a preferred status not otherwise countenanced by this Court's Establishment Clause jurisprudence.

ARGUMENT

I. The Milford Central School District Did Not Violate The Free Speech Rights Of The Good News Club When It Denied The Club Access To The Use Of Public School Facilities.

It is undisputed that Milford has established a limited public forum (*Good News Club*, 202 F.3d at 509; Petitioners' Brief at p. 16). This Court has acknowledged repeatedly that where government property is not a traditional public forum "devoted to assembly and debate" either "by long tradition or by government fiat" or a designated public forum opened intentionally "for indiscriminate public use for communicative purposes" (*Cornelius*, 473 U.S. at 802; *Lamb's Chapel*, 508 U.S. at 392-93), government may restrict public access thereto "based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." (*Lamb's Chapel*, 508 U.S. at 392-93; *see, Cornelius*, 473 U.S. at 806). Milford's forum allows private groups the use of its school facilities for "instruction in any branch of education, learning or the arts" and "the welfare of the community". (Petitioners' Brief at p. 16). According to the Club, the activities for which it sought to use Milford's facilities involve instruction on moral values from a religious viewpoint. (Petitioners' Brief at p. 17). Therefore, the Club alleges that Milford's denial of its application constituted viewpoint discrimination in violation of the Club's rights of equal access under the Free Speech

Clause of the Federal Constitution. (Petitioners' Brief at pp. 17-22).

To establish an equal access violation in the present case, the Club must show that its activities indeed constitute instruction or a viewpoint on matters otherwise permissible within Milford's forum. (*Lamb's Chapel*, 508 U.S. at 392-94). However, the teaching of Bible lessons, memorization of Scripture, a challenge and invitation to "establish[ ] a relationship with Christ" (Petitioners' Brief at p. 8), and the recitation of prayer at the start and close of the Club's meetings, (Joint Appendix at F4; Petitioners' Brief at p. 8), constitute proselytization and religious worship rather than mere instruction or a viewpoint. (*See Good News Club*, 202 F.3d at 510-11). The *amicus* respectfully submits that, under any standard, proselytization evokes exhortation to adopt or maintain adherence to a particular belief or system of beliefs. Instruction entails a factual, objective presentation about a specific topic. A viewpoint involves a perspective. The terms only become blurred "by the active imagination of hypothesized application." (*Campbell v. St. Tammany's School Board*, 206 F.3d 482, 485 (5th Cir. 2000), *rehearing en banc denied*, 231 F.3d 937 (5th Cir. 2000)). It is a tortured interpretation of language to characterize prayer as a religious viewpoint on the subject of moral values. If one concludes that, by definition, prayer is nothing more than a religious viewpoint, then the exclusion of prayer as a viewpoint on any topic otherwise permitted within a limited public forum automatically would result in unlawful viewpoint discrimination. The same would be true regarding the exclusion of activities involving the memorization of Scripture

and the inculcation of religious beliefs through the study of Bible passages alleged to be a viewpoint on any topic within the forum.

Nonetheless, the Club and its *amici* argue that Milford's decision to exclude the Club from its forum constitutes a violation of the Club's equal access rights because this Court's prior decisions in *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) and *Widmar v. Vincent*, 454 U.S. 263 (1981), elevate speech "with an evangelistic component" out of "second-class status" and accord it the same protection as other forms of private speech. (Petitioners' Brief at pp. 20-21). However, "[p]rotected speech is not equally permissible in all places at all times. Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their rights to free speech . . . " (*Cornelius*, 473 U.S. at 799). Therefore, the *Widmar* and *Rosenberger* decisions, which arise out of the university campus instead of an elementary or secondary school environment, are not dispositive of this case. The issue still remains whether Milford's limited public forum forecloses access for the type of proselytizing activities at issue herein. For the reasons set forth throughout this brief, it does.

In this context, it is also important to assess the reasonableness of excluding proselytizing activities conducted by private groups on public school premises targeted at elementary school children in relation to the special characteristics and sensibilities which this Court has acknowledged to exist within a public school environment. (*County of Allegheny*, 492 U.S. at 620 fn. 69). It was mindful of these special attributes that when Congress passed the Equal Access Act, 20 U.S.C. §§ 4701 *et*

seq., it allowed student Bible clubs to meet on public school premises only at the high school level. Furthermore, most relevant to the issues before this Court, Congress also required as a condition for the exercise of equal access rights under the Act that such clubs be student-initiated and student-led, and not be "directed, controlled, conducted or regularly attended by non-school persons." (20 U.S.C. § 4701(c)(1),(2),(4) and (5); *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, 236 (1990)).

As such, it is similarly reasonable for a public school district, exercising its legislative authority to establish a limited public forum, to exclude from the forum activities that are targeted at elementary or secondary school age children and that are organized, directed, controlled, conducted and regularly attended by non-school persons for the purpose of evangelizing those children. A ruling in favor of the Club reaches beyond the limits established by Congress and recognized by this Court in *Mergens*. It is equally noteworthy that the activities at issue in both the *Widmar* and *Rosenberger* cases, relied upon by the Club and its *amici*, involved student-organized activities at the university level. They did not involve outside private groups, or impressionable students, as young as age six, as the target of outside private groups.

Finally, Milford adopted its "Community Use of School Facilities" policy on August 26, 1992 (Joint Appendix at F2), subsequent to a decision by the U.S. Court of Appeals for the Second Circuit in a case entitled *Deeper Life Christian Fellowship, Inc. v. Board of Education of the City of New York*, 852 F.2d 676 (2nd Cir. 1988). In that case, a fundamentalist Christian church applied for permission

to use school facilities for religious worship and instruction, arguing among other things, that its proposed use of school facilities fell within the language of New York Education Law § 414(1)(a) which, like Milford's policy, authorizes the use of public school facilities by outside groups "for the purpose of instruction in any branch of education in learning or the arts." The Second Circuit determined that: "[T]he thrust of the statute is to promote knowledge, rather than to provide a forum for proselytizing or indoctrinating the public in a particular group's beliefs." (852 F.2d at 680).

Therefore, at the point in time when Milford adopted its policy, it was not at liberty to interpret Education Law § 414(1)(a) differently than the Second Circuit had interpreted it, and it could not have intended the provision in its policy which mirrored the language of § 414(1)(a) to authorize anyone to use its facilities to engage in religious instruction. As such, Milford framed the boundaries of its limited public forum in conformity with the law of the Second Circuit and its actions cannot be said to have been motivated by any hostility toward religion.

Some might argue, of course, that this Court's *Lamb's Chapel* decision supersedes the Second Circuit's statutory interpretation of Education Law § 414(1)(a) in *Deeper Life*, but to do so one must conclude that there is no distinction between religious instruction and worship and a religious viewpoint. However, the *amicus* submits that this Court's ruling in *Lamb's Chapel* does not lead inexorably to that conclusion. Rather, whether it is constitutionally permissible for the host of a limited public forum to frame the boundaries of the forum in a way that draws a distinction between religious instruction and worship

as a subject matter and a religious viewpoint on a subject matter to which the forum already has been opened, is precisely the question presented by this case. This Court has not expressly addressed the issue of whether religious worship and proselytizing activities are mere viewpoints, but it does appear to have acknowledged a distinction between religion as a subject matter and religion as a viewpoint. (*See Lamb's Chapel*, 508 U.S. at 390-94 and *Rosenberger*, 515 U.S. at 828-29).

In this context, contrary to the argument advanced by the Club and its *amici*, it is not unworkable to make such a distinction. Moreover, to adopt a rule that would foreclose the host of a limited public forum from regulating speech and activities regardless of the nature and extent of the activity, once a speaker alleges it is presenting a "religious viewpoint" on a subject matter already within the forum, would elevate religion to a preferred status which this Court's Establishment Clause jurisprudence would not countenance.

II. Establishment Clause Concerns Justified Milford's Decision To Deny The Club's Request To Meet On School Premises.

As set forth more fully above, Milford did not engage in any act of viewpoint discrimination when it excluded the Club from accessing school premises for its requested usage. However, even assuming *arguendo* that such exclusion was viewpoint discriminatory, the *amicus* respectfully submits that such exclusion was justified by the compelling state interest of avoiding a violation of the

Establishment Clause. (*See, e.g., Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995); *Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 271).

The *amicus* recognizes that this Court's previous decisions finding Establishment Clause violations to exist occurred in the context of school sponsored activities whether they be during or after the school day, (*see, e.g., McCollum v. Board of Educ. of School Dist. No. 17*, 333 U.S. 203 (1948); *Engle v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Stone v. Graham*, 449 U.S. 39 (1980); *Lee v. Weisman*, 505 U.S. 577, *supra*; *Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. 2266, *supra*), and not in the context of private speech occurring on school premises. Nevertheless, the *amicus* respectfully submits that this Court, in its previous decisions, did not necessarily set up a litmus test precluding school districts from demonstrating the existence of an Establishment Clause violation simply because the requested usage of school premises was by an outside group.

In the present case, there is no dispute in the Record that the Club applied for access to meet with young elementary age students immediately after the school day. (Joint Appendix at P29). In fact, it is quite conceivable that while the Club's activities would be getting underway, numerous children not otherwise associated with the Club, who might be passing by in the hallway outside of the room in which the Club would meet, would hear the Club's messages as presented by adults. Such impressionable young students could certainly gain the impression that the Club's religious messages of indoctrination is being presented by Milford officials.

Indeed, before and after school programs are becoming more and more commonplace in school districts throughout the nation, and it is not uncommon for children to remain upon the premises of their school buildings well after the close of the school day.

Previously, in *Board of Educ. of the Westside Community Schools v. Mergens*, 496 U.S. 226, *supra*, this Court upheld the constitutionality of the Equal Access Act which requires public high schools to allow student religious and political clubs to meet on the same basis as other non-curriculum-related activities. Nevertheless, the Court recognized that the Act was limited to secondary grade students who were less impressionable and that such club activities could not be directed by an outside group or person. Indeed, college and university campuses are quite different from elementary settings with respect to the ability of college age students to discern differences between private speech and speech which is governmentally directed and/or sponsored. (*See Widmar*, 454 U.S. at 274 fn. 14).

Although the *amicus* recognizes that the Club's request in the present case does not fall under the Equal Access Act, concerns regarding the impressionability of young elementary age students should nevertheless be recognized as supplying Milford the requisite compelling state interest to avoid an Establishment Clause violation. Indeed, whether this Court applies its often criticized *Lemon* test (*see Lemon v. Kurtzman*, 403 U.S. 602 (1971)), an "endorsement" test (*see Agostini v. Felton*, 521 U.S. 203 (1997); *County of Allegheny*, 492 U.S. at 592-94; *Lynch v. Donnelly*, 465 U.S. 668, 692-94 (1984) (O'Connor, J., concurring)), or a "*coercion*" test, heretofore not yet adopted

in this context (*see County of Allegheny*, 492 U.S. at 660 (Kennedy, J., concurring in the judgment in part and dissenting in part)), it is clear that school districts across the nation, including Milford in the present case, can clearly demonstrate the existence of a compelling state interest to prevent young impressionable students, at a time immediately at the conclusion of their school day from perceiving their school to be fostering religious indoctrination.

The Club maintains that a scenario which is just as likely to occur, if the decision of the Court below is affirmed, is that young impressionable children will gain the belief that their school district is hostile towards religion. (Petitioners' Brief at p. 35). However, in the present case, Milford maintained its actions in conformity with the Establishment Clause and not in violation of it by precluding the Club from meeting immediately after the school day for a purpose which would clearly communicate to young elementary school age children that their houses of learning are also houses of worship and indoctrination. The *amicus* respectfully submits that the suggestion that elementary age children would perceive their schools as being hostile towards religion simply by being required to secure messages of religious indoctrination in other facilities including churches and synagogues is without merit.

Indeed, this Court in *McCollum*, 333 U.S. 203, *supra*, recognized that Establishment Clause impressionability problems would arise if children were released to secure religious instruction upon the premises of their own school buildings. Indeed, although this Court in *Zorach v.*

Clauson, 343 U.S. 306 (1952), did not find it constitutionally troubling for children to be released during the school day for religious instruction, such instruction was to be secured only off the premises of the public school building. Although it is certainly true that both *McCollum* and *Zorach* involved release time activities proposed to occur during the school day, the facts of the instant case, present equally troubling Establishment Clause problems.

As set forth above, a reversal by this Court of the decision below will place the children involved in this case in the position of witnessing acts of religious indoctrination at a time in their lives when they will not be able to discern what is school sponsored and what is not. Accordingly, the concern regarding impressionability of young children and Establishment Clause violations is most certainly in existence under the facts of this case.

Indeed, this Court as recently as this past year restated that the Constitution requires "that we keep in mind 'the myriad subtle ways in which Establishment Clause can be eroded.'" (*Doe v. Santa Fe Independent School Dist.*, 120 S.Ct. at 2281 (citations omitted)). It is unquestionable that the Establishment Clause will certainly be eroded if this Court takes away the authority on the part of school districts to shield impressionable children from messages of religious indoctrination simply because such messages are scheduled to take place after the school day.

This Court has previously recognized that "the law reaches past formalism." (*Lee v. Weisman*, 505 U.S. at 595,

supra). Indeed, it would be a most "formalistic" distinction to find the existence of Establishment Clause concerns to only arise in the context where schools are directly involved in sponsoring certain activities or only when such activities occur during the school day notwithstanding the actual effect upon the minds of impressionable students.

III. Milford Did Not Become Excessively Entangled With Religion In Violation Of the Establishment Clause When It Asked The Club For A Description Of Its Intended Use Of School Facilities And For Supplemental Information Elaborating On Those Intentions.

When public school districts open their facilities to designated uses by outside groups, they necessarily inquire about each group's proposed use of school facilities to determine whether the use is consistent with district policy. The Club's argument that the act of inquiry itself excessively entangles public schools with religion cannot be reconciled with this Court's prior rulings.

In *Agostini v. Felton*, 521 U.S. 203, this Court made clear that:

> Not all entanglements . . . have the effect of advancing or inhibiting religion . . . Entanglement must be "excessive" before it runs afoul of the Establishment Clause. (*Id.*, at 233).

In so stating, this Court expressly referred to the case of *Bowen v. Kendrick*, 487 U.S. 589 (1988), involving a challenge to the Adolescent Family Life Act (AFLA) which authorized federal grants to both public and nonprofit

private organizations for services and research in the area of premarital adolescent sexual relations and pregnancy. According to this Court, *Bowen* did not involve excessive entanglement even though AFLA requires that government **"review[ ] the adolescent counseling program** set up by the religious institutions that are grantees, **review [ ] the materials used by such grantees**, and monitor[ ] the program by periodic visits." (*Agostini*, 521 U.S. at 233 (citing, *Bowen*, 487 U.S. at 615-17), (emphasis added)).

In the instant case, the Club completed a "Use of School Facilities Request Form" on which it described the purpose of its proposed use of school facilities as follows: "A Good News Club is a group of boys and girls meeting one hour a week for a fun time of singing songs, **hearing a Bible lesson and memorizing scripture**." (Lodging at W1 (emphasis added)). After reviewing the application, Milford's Superintendent denied the Club use of school facilities, finding the Club's "proposed use to be the equivalent of religious worship, which is prohibited under our District policy, rather than the expression of religious views or values on a secular subject matter." (Joint Appendix at H1-H2). Thereafter, in response to Milford's request for further information, the Club's attorney indicated that:

> The Club's activities are run by Ms. Darlene Fournier. The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia*, learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members'

> lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and Bible verses for memorization. (Joint Appendix at J1-J2).

Milford also asked the Club to furnish the written materials that it proposed to use as part of its lessons. (Joint Appendix at F3-F4).

Milford reviewed the Club's program and the supplemental materials submitted by the Club, just as the government in *Bowen* reviewed the counseling programs set up by the religious institutions in that case. Thereafter, it again denied the Club's application for the use of school facilities. (Joint Appendix F6-F7).

In the process of defending its position in litigation, Milford deposed the Reverend Stephen Fournier. According to the Club, Milford asked "intrusive, probing questions about religious elements of Club Activities," (Petitioners' Brief at p. 25), thereby implying that Milford was unable to distinguish between viewpoint and subject matter without deposing the Reverend. However, the facts of this case do not bear out that claim.

It is undeniable that Reverend Fournier's deposition testimony amplified the details of the Club's proposed use of school facilities above and beyond the information that the Club initially supplied on the application form. For example, the Reverend Fournier admitted in his deposition that 6-12 year olds who attend Club meeting are invited by their instructor, in this case Darlene Fournier, to "come to know Jesus Christ as their Savior" (Joint Appendix at P69) and that the invitation is "offered to the class as a whole . . . " (Joint Appendix at P71).

However, to the extent that Reverend Fournier's deposition testimony supplied the courts below with any hindsight, the lesson of that hindsight is that Milford got it right the first time. Milford did not need to depose the Reverend Fournier to ascertain that the Club intended to engage in religious worship and instruction. Milford was able to determine from an examination of the application form and from a minimally intrusive request for, and examination of, additional information supplied by the Club, that the Club's proposed use of school facilities violated district policy against using school facilities for religious worship and religious instruction.

The Club's argument that Milford cannot distinguish between religious worship or religious instruction vis-a-vis a religious viewpoint on a secular theme without unconstitutionally entangling itself with religion is simply an extension of the Club's argument that it is difficult if not impossible for Milford to make this distinction at all. Under this reasoning, the only way for Milford to disentangle itself from religion would be to disengage from the process of inquiry altogether whenever the applicant proposes to present a religious viewpoint, which would elevate religion to a sacrosanct status in Milford's limited public forum.

No such result is required under the facts of this case, because Milford did not excessively entangle itself with religion simply by asking the Club to describe its intended use of school facilities and to supply additional information elaborating on its intentions. The inquiry engaged in was limited to that which was necessary to preserve the boundaries of Milford's limited public forum.

CONCLUSION

Milford's exclusion of religious worship and religious instruction from the range of permissible uses of school facilities by outside groups is constitutionally permissible, because it is reasonable in light of the purpose served by the schoolhouse as a limited public forum, and viewpoint neutral. Even if this court finds that Milford engaged in viewpoint discrimination by denying the Club access to its limited public forum for the purpose of engaging in religious worship and religious instruction, Milford had a compelling justification for excluding the Club's activities based on Establishment Clause concerns.

Petitioners' argument that Milford excessively entangles itself with religion by making a limited inquiry into each applicant's proposed use of school facilities is wholly without merit.

Therefore, the *amicus* respectfully submits that the judgment of the U.S. Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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